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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

11 Lillie Mae Washington,

12 Plaintiff,

13 vs.

14 AMERICAN HOME LOANS DIRECT,  
15 Inc., a Delaware Corporation dba DE HDL,  
16 Inc., its successors and assignees, OCWEN  
17 LOAN SERVICING, LLC, a Delaware  
18 Corporation, MORTGAGE ELECTRONIC  
19 REGISTRATION SYSTEM, Inc., Hisham  
20 Desouki, Christopher Cox, Jonathan Annett,  
21 LODES CAPITAL ESCROW Inc., Nikki  
22 Hall, FOX FIELDS FINANCIAL, Inc. ,  
23 Christopher Fox, WESTERN  
24 PROGRESSIVE, LLC and DOES 1-10  
25 inclusive,

26 Defendants.

Case No.: 2:09-8213 SJO (RZx)

Honorable: S. James Otero

**PLAINTIFF'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO  
DEFENDANT OCWEN LOAN SERVICING  
AND MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.'S  
MOTION TO DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT**

[Fed. R. Civ. P. 12 (b)(6)]

Hearing: July 26, 2010

Time: 10:00 P.M.

Dept.: 1

27 Plaintiff LILLIE MAE WASHINGTON (hereinafter "Plaintiff") hereby submits this  
28 Memorandum of Points and Authorities in Opposition to Defendant OCWEN LOAN  
SERVICING, LLC (hereinafter "OCWEN") and MORTGAGE ELECTRONIC  
REGISTRATION SYSTEM, Inc. (hereinafter "MERS"), collectively referred to hereinafter as  
("Defendants") Motion to Dismiss Plaintiff's First Amended Complaint.

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1           **I.       INTRODUCTION**

2           This action arises as a result of predatory and abusive mortgage lending practices that  
3 led to the threatened foreclosure of the home of LILLIE MAE WASHINGTON (herein  
4 "Plaintiff"). Plaintiff was fraudulently induced to refinance to an adjustable rate mortgage  
5 that she did not knowingly agree to accept. Now, Plaintiff is faced with an interest rate that  
6 has adjusted upward causing a significantly larger monthly premium than the one she agreed  
7 to pay.  
8

9  
10          This action is filed under TILA and related laws to enforce Plaintiff's right to rescind  
11 her mortgage loan, to cease the default process initiated on Plaintiff's home, and to recover  
12 actual and statutory damages and reasonable attorney's fees and costs.  
13

14           **II.       SUMMARY OF CASE**

15          On November 2009, Plaintiff filed her complaint alleging six causes of action against  
16 Defendants and six others. On May 24, 2010, Plaintiff filed her First Amended Complaint  
17 against Defendants and six other parties for their part in violating the Truth in Lending Act  
18 (TILA); the Real Estate Settlement Procedures Act (RESPA); Unfair Competition under  
19 California Business and Professions Code § 17200; Fraud; Rescission of Contract,  
20 Predatory Lending, Injunctive Relief; Declaratory relief; negligent Misrepresentation;  
21 Violation of Consumer Lending Remedies Act; Breach of Fiduciary Duties; Financial  
22 Abuse of Elders; and Unjust Enrichment.  
23  
24

25          On June 17, 2010, Defendants filed a Motion to Dismiss Plaintiff's First Amended  
26 Complaint. Finally, on July 7, 2010 Plaintiff filed this Memorandum of Points and  
27 Authorities in Opposition to Defendant's Motion to Dismiss.  
28

### III. STATEMENT OF THE FACTS

Plaintiff is a 94 year old woman that has been living in her home for about 36 years. She owns property located at 2315, 2315 1/4 and 2315 1/2 Houser Boulevard, Los Angeles, California.

On or about October, 2006, an agent of AMERICAN HOME LOAN communicated with Hobert Washington, Plaintiff's recently deceased son. Without the knowledge of Plaintiff, the agent persuaded Hobert Washington to obtain a loan from AMERICAN HOME LOAN. On information and belief, Hisham Desouki had a face-to-face meeting with Hobert Washington to complete his residential loan application. Prior to his death, Hobert Washington was suffering from Alzheimer's disease and his cognitive impairment would have been immediately visible and obvious to anyone who spoke and interacted with him. Despite this, AMERICAN HOME LOAN and its agent had Hobert Washington sign loan documents without having any immediate family members present to help him.

On or about October, 2006, AMERICAN HOME LOAN agent Jonathan Annett came to Plaintiff's home with loan documents already prepared. At the meeting with Mr. Annett was Plaintiff, Plaintiff's daughter, Sandra Warren, and Plaintiff's son, Bobby Washington. Hobert Washington was not present at the meeting. This is the only meeting Mr. Annett had with Plaintiff. There were no discussions between Mr. Annett and Plaintiff either before or after the October, 2006 meeting.

At the meeting, Mr. Annette stressed to Plaintiff that she "needed to get out of" their existing mortgage. He represented to Plaintiff that she would receive \$80,000 in cash, that the payments would not commence until June, 2007, and that the monthly mortgage payment

1 would be between \$600 to \$700 per month. He also stated that the interest rate would be  
2 about 6 percent and that the loan would be for a fixed rate.

3 Plaintiff relied upon these representations made by Mr. Annett and thus signed the  
4 loan documents at the meeting in October, 2006. There was no notary present when she  
5 signed the documents and Plaintiff did not sign a notary log.  
6

7 Mr. Annett failed to clearly and conspicuously disclose the key provision of Plaintiff's  
8 mortgage, including but not limited to such details as the interest rate, which adjusted in a  
9 very complicated manner, specific loan terms, and the total dollar amount the mortgage  
10 would cost over time.  
11

12 Defendant's loan was structurally unfair and was designed to be difficult for Plaintiff  
13 to understand due to its multiple layers of risk and Defendant took no meaningful  
14 consideration as to whether Plaintiff could afford to pay the loans.  
15

16 Furthermore, Mr. Annett did not leave any documents or provide Plaintiff with any  
17 copies of documents even though the Washingtons specifically asked for copies.  
18 Additionally, Mr. Annett did not provide Plaintiff with the Truth in Lending Act ("TILA") or  
19 the Housing and Urban Development ("HUD") settlement statement as required by law.  
20 Although Mr. Annett stated he would send the loan documents via overnight mail, he never  
21 did. Because Mr. Annett did not provide Plaintiff with the TILA and HUD disclosures,  
22 Plaintiff did not have any meaningful opportunity to exercise her right to cancel the loan as  
23 provided for under 15 U.S.C. § 1641(c).  
24

25  
26 AMERICAN HOME LOAN continued to delay giving the Washingtons copies of the  
27 loan documents. Shortly after the October, 2006 meeting with Plaintiff, Bobby Washington  
28

1 called AMERICAN HOME LOAN and asked for copies of the documents. The documents  
2 were again not sent. Later, Bobby Washington called again and spoke with Jonathan  
3 Spannagel of AMERICAN HOME LOAN and asked him to provide copies of the  
4 documents.

5  
6 After several requests to produce all documents, AMERICAN HOME LOAN  
7 provided Plaintiff with the following two documents.

8 (1) an undated and unsigned document stating "The loan was just finished for you is  
9 just a credit repair loan. We supplied enough payment for 6 months. We have paid  
10 off all the debt in full so that the credit score will rise. After the 6 months we will be  
11 able to recast the loan to a more comfortable payment."

12  
13 (2) a handwritten note stating that "I ordered the whole packet from escrow. It will be  
14 here next week then I will send it to you. Sorry for the Inconvenience [sic] and the  
15 misunderstanding. Everything will be alright."

16  
17 On or about November 25, 2006, Plaintiff finally received copies of the loan  
18 agreement. The Washingtons were shocked to learn that the loan payments began in  
19 December, 2006 instead of June, 2007 as promised by Mr. Annett. Plaintiff also received a  
20 cash payment of \$95,909.25 which was much more than the \$80,000 discussed in the  
21 meeting with Mr. Annett. The Washington's were also shocked to learn that the monthly  
22 payment on the adjustable rate loan was \$2,582.29, which was approximately three times the  
23 amount that Mr. Annett informed Plaintiff that she would be required to pay. Furthermore,  
24 they learned the payments were projected to increase to \$2,931.25 on December 1, 2008 and  
25 to \$3,163.01 on December 1, 2011. The last payment was projected to be \$3,161.01.  
26  
27  
28



1 Because the monthly payments were outside of Plaintiff's budgeted amount, she was forced  
2 to use the cash out payment to make the monthly payments on the loan.

3 On or about September 16, 2008, Plaintiff and her now deceased son, Hobert  
4 Washington filed a state court claim against AMERICAN HOME LOANS DIRECT for  
5 Fraud, Negligent Misrepresentation, Breach of Fiduciary Duties, Financial Abuse of Elders,  
6 Undue Influence, and Violations of the Consumer Legal Remedies Act, and California  
7 Business & Professions Code § 17200.  
8

9 On or about September, 2009, Plaintiff's daughter, Sandra Warren, contacted a  
10 representative of Defendant OCWEN LOAN SERVICING LLC to discuss a loan  
11 modification with them on behalf of her mother. Ms. Warren completed and sent a loan  
12 modification application to Defendant OCWEN LOAN SERVICING LLC but neither she  
13 nor Plaintiff ever heard back from them about the application.  
14

15 On or about October, 2009, Plaintiff could not continue to pay the overwhelmingly  
16 large payments each month and was forced to make her last monthly payment to date on the  
17 mortgage. Plaintiff's inability to pay the monthly loan payment is a direct result of Mr.  
18 Annett's misrepresentations about the loan and his failure to provide the required disclosures  
19 and copies of the loan documents in a timely fashion.  
20

21 On or about November 13, 2009, Plaintiff filed a complaint In Pro Se in the United  
22 States District Court for the Central District of California asserting all of the same causes of  
23 actions appearing in this complaint along with a few other causes of action not alleged  
24 herein.  
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1 On or about April 15, 2010, Defendant WESTERN PROGRESSIVE, LLC began  
2 sending Plaintiff Notices of Default. This practice continues to be conducted in an  
3 aggressive and harassing manner as Defendant WESTERN PROGRESSIVE, LLC sends ten  
4 copies of the same notices at a time. The Notices of Default state that they may set the date  
5 for the sale of Plaintiff's property to occur three months from the April 15, 2010, recordation  
6 date appearing on the form.  
7

8 Plaintiff remains in the subject property pending the litigation of these claims.  
9 Plaintiff holds Defendant AMERICAN HOME LOAN DIRECT and OCWEN LOAN  
10 SEVICING, LLC as successors and their agents liable for violations of State and Federal  
11 law.  
12

#### 13 IV. ARGUMENT

14 Federal Rule of Civil Procedure Rule 12(b)(6) states that a party may assert a defense  
15 by motion to show that the complaint fails to state a claim upon which relief can be granted.  
16 Such a motion tests the legal sufficiency of the claims asserted in the complaint. *Garbor v.*  
17 *County of Santa Clara Bd. of Supervisors*, 2008 U.S. Dist. LEXIS 32115 p.8. A court can  
18 dismiss a claim based on the "lack of a cognizable legal theory" or "the absence of sufficient  
19 facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d  
20 696, 699 (9th Cir. 1988). The court should consider not whether the non-moving party will  
21 ultimately prevail in the matter but whether it is entitled to offer evidence to support the  
22 claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The  
23 court's review is limited to the face of the complaint, documents referenced in the complaint,  
24 and documents of which the court takes judicial notice. *Levine v. Diamantheset, Inc.*, 950  
25  
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1 F.2d 1478, 1483 (9th Cir. 1991). The evaluating court must accept all material allegations in  
 2 the complaint as true and must construe them in the light most favorable to the nonmoving  
 3 party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). The court is bound to give  
 4 plaintiff the benefit of every reasonable inference to be drawn from the allegation of the  
 5 complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n. 6. (1963). "A  
 6 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
 7 draw the reasonable inference that the defendant is liable for the misconduct alleged."  
 8 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

11 If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are  
 12 presented to and accepted by the court, the motion must be treated as a summary judgment  
 13 and all parties must be given a reasonable opportunity to present all material that is pertinent  
 14 to the motion. Fed. Rules of Civ. Proc. R 12(d). With these general principals in mind, the  
 15 court is urged to consider the following arguments as to why Defendant's 12(b)(6) motion  
 16 should be denied.

18 **A. PLAINTIFF'S AMENDED COMPLAINT SUFFICIENTLY SATISFIES**  
 19 **FEDERAL RULE OF CIVIL PROCEDURE 8 (A).**

20 Plaintiff clearly and concisely states her allegations against all the named Defendants in  
 21 the First Amended Complaint satisfying Rule 8 (a). Furthermore, a party may set out 2 or  
 22 more statements of a claim or defense alternatively or hypothetically, either in a single count  
 23 or defense or in separate ones. If a party makes alternative statements, the pleading is  
 24 sufficient if any one of them is sufficient. Fed. Rule of Civ. Proc. 8 (c). Again, Plaintiff  
 25 meets and exceeds this requirement by detailing her claims and allegations against all  
 26 defendants and their successors.

**B. PLAINTIFF'S TILA CLAIM IS NOT TIME BARRED AND THE CLAIM HAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT THE ALLEGATIONS AGAINST OCWEN AND MERS.**

Plaintiff only recently discovered Defendants' failures to disclose important information about the terms of the loan and Defendants' failure to provide her with clear information and materials about the loan. Because Defendants and their agents did not reveal this information to Plaintiff at the time she entered into the loan agreement with them, equitable tolling applies here.

Plaintiff relied upon representations made by Mr. Annett and thus signed the loan documents at the meeting in October, 2006. There was no notary present when she signed the documents and Plaintiff did not sign a notary log.

Mr. Annett failed to clearly and conspicuously disclose the key provision of Plaintiff's mortgage, including but not limited to such details as the interest rate, which adjusted in a very complicated manner, specific loan terms, and the total dollar amount the mortgage would cost over time.

Defendant's loan was structurally unfair and was designed to be difficult for Plaintiff to understand due to its multiple layers of risk and Defendant took no meaningful consideration as to whether Plaintiff could afford to pay the loans.

Furthermore, Mr. Annett did not leave any documents or provide Plaintiff with any copies of documents even though the Washingtons specifically asked for copies. Additionally, Mr. Annett did not provide Plaintiff with the Truth in Lending Act ("TILA") or the Housing and Urban Development ("HUD") settlement statement as required by law. Although Mr. Annett stated he would send the loan documents via overnight mail, he never

1 did. Because Mr. Annett did not provide Plaintiff with the TILA and HUD disclosures,  
2 Plaintiff did not have any meaningful opportunity to exercise her right to cancel the loan as  
3 provided for under 15 U.S.C. § 1641(c).

4 AMERICAN HOME LOAN continued to delay giving the Washington's copies of the  
5 loan documents. Shortly after the October, 2006 meeting with Plaintiff, Bobby Washington  
6 called AMERICAN HOME LOAN and asked for copies of the documents. The documents  
7 were again not sent. Later, Bobby Washington called again and spoke with Jonathan  
8 Spannagel of AMERICAN HOME LOAN and asked him to provide copies of the  
9 documents.  
10

11  
12 After several requests to produce all documents, AMERICAN HOME LOAN  
13 provided Plaintiff with the following two documents.

14 (1) an undated and unsigned document stated "The loan was just finished for you is  
15 just a credit repair loan. We supplied enough payment for 6 months. We have paid  
16 off all the debt in full so that the credit score will rise. After the 6 months we will be  
17 able to recast the loan to a more comfortable payment."  
18

19 (2) a handwritten note stating that "I ordered the whole packet from escrow. It will be  
20 here next week then I will send it to you. Sorry for the Inconvenience and the  
21 misunderstanding. Everything will be alright." On or about November 25, 2006,  
22 Plaintiff finally received copies of the loan agreement.  
23

24 In *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986) the Ninth Circuit held that the  
25 doctrine of equitable tolling may suspend the limitations period until the borrower discovers  
26 the fraud or nondisclosure that form the basis of the TILA action. In remanding the case, the  
27  
28

1 court also held that the determination as to whether equitable tolling applies is a question of  
2 fact for the district court to decide. *Id.*

3 Contrary to Defendant's claim, Plaintiff has pled facts in the complaint establishing that  
4 equitable tolling is appropriate. First, Plaintiff pled that Defendants failed to "clearly and  
5 conspicuously disclose the key provisions of the mortgage." Plaintiff further pled that  
6 Defendants failed to explain and /or disclose in a meaningful manner the terms and  
7 conditions of their loan products and instead provided borrowers like Plaintiff with  
8 incomplete or confusing information related to product features, material loan terms, product  
9 risks, and the borrowers' obligations for property taxes and insurance. This language  
10 illustrates that Plaintiff did not have the information required which would have put her on  
11 notice of the TILA violation. Additionally, the complaint specifically states that all statutes  
12 of limitations relating to disclosures and notices required pursuant to 15 U.S.C. § 1601, et  
13 seq., were tolled due to the hidden nature of this violation, which did not reveal itself until  
14 within the past year Finally, the complaint asserts several claims for monetary damages in  
15 the prayer for relief.

16 These passages present, at the very least, genuine issue of disputed facts that provide this  
17 court with ample justification to deny Defendant's motion to dismiss.

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23 **C. AS AN ASSIGNEE AND THIRD PARTY BENEFICIARY OF THE MORTGAGE,**  
24 **DEFENDANTS ARE ACCOUNTABLE FOR THE PREDATORY LENDING AND**  
25 **UNFAIR COMPETITION ACTS COMMITTED BY THE LOAN ORIGINATOR.**

26 An assignment of the Deed of Trust of the subject loan was passed from defendant AMERICAN  
27 HOME LOAN to defendant OCWEN and was registered by defendant MERS. MERS acted in  
28

1 concert with OCWEN to complete the loan assignment to OCWEN. It would be unfair for any  
2 claims attached to the note to die with that assignment.

3 In *Thomas v. U.S. Bank National Association ND*, 575 F.3d 794 (8th Cir. 2009), the Eight  
4 Circuit recently prevented Defendant UBNA from wrongfully cleansing itself of tainted loans as  
5 Defendants are attempting to do in this case. The *Thomas* court held:

7 "Any person who purchases or is otherwise assigned a [tainted] mortgage  
8 shall be subject to all claims and defenses with respect to that mortgage that  
9 the consumer could assert against the [original lender]. To hold otherwise  
10 would allow an originating bank to cleanse an otherwise illegal loan merely  
11 by assigning it to a national bank." See 15 U.S.C. § 1641(d).

12 This court should apply this rule here to stop Defendants from attempting to wipe this tainted  
13 California loan clean by obtaining it as assignee.

14 **D. THE RESPA CLAIM IS ALSO TIMELY DUE TO PLAINTIFF'S RECENT  
15 DISCOVERY OF THE CLAIM WHICH TOLLS THE STATUTE OF  
16 LIMITATIONS.**

17 By alleging facts that show the statute of limitations should be tolled, a plaintiff is entitled to  
18 equitable tolling. *Kelly v. Mortgage Elec. Registration Sys.*, 642 F.Supp.2d 1048, 1058 (ND Cal.  
19 2009). Similar to the argument above regarding the TILA claim, Plaintiff only recently discovered  
20 Defendants' failures to disclose the self-serving, deceptive, and fraudulent aspects of the loan.  
21 Furthermore, Plaintiff incorporated by reference all the facts establishing equitable tolling to the  
22 RESPA count. Therefore, because she discovered this information recently, equitable tolling also  
23 applies here.

**E. PLAINTIFF'S RESCISSION OF CONTRACT AND UNDERLYING TILA CLAIM DOES NOT FAIL BECAUSE DEFENDANTS ARE AN ASSIGNEE AND A THIRD PARTY BENEFICIARY OF THE MORTGAGE.**

Defendants are liable to the Plaintiff under the original contract because OCWEN is an assignee of the loan and MERS is a third-party beneficiary; both defendants are liable under the original contract. See explanation in *Section C*.

**F. PLAINTIFF'S PREDATORY LENDING CLAIM DOES NOT FAIL BECAUSE APPROPRIATE ALLEGATIONS WERE MADE IN PLAINTIFF'S FIRST AMENDED COMPLAINT.**

Plaintiff's loan was a covered loan and Plaintiff incorporated the entire loan agreement into its First Amended Complaint, and the loan agreement was attached as Exhibit A to the First Amended Complaint. See Page 7-8 of the First Amended Complaint whereby Plaintiff incorporated the loan agreement into the First Amended Complaint.

Defendants are liable for predatory lending claims as an assignee of the loan and a third-party beneficiary. See explanation in *Section C*.

**G. PLAINTIFF IS ENTITLED TO A JUDICIAL DETERMINATION OF PLAINTIFF AND DEFENDANTS' RIGHTS**

Plaintiff seeks a judicial declaration and determination of her and defendant's respective rights and duties. Plaintiff's statements in its First Amended Complaint do not render her ineligible to seek a court's determination of the issues in this matter.

**H. PLAINTIFF'S SHOULD BE GRANTED INJUNCTIVE RELIEF**

Injunctive relief is based upon a likelihood of success on the merits of the case. Based on the First Amended Complaint and reasons explained throughout this responsive motion, the Plaintiff has a likelihood of success on the merits of her case and should be granted injunctive relief.

**I. PLAINTIFF'S HAS A VALID CLAIM OF UNJUST ENRICHMENT**

Ocwen is an assignee of the original loan and it undoubtedly benefitted from the fraudulent assignment if the original loan to it. MERS also benefitted from the fraudulent loan assignment to



Ocwen because it was custodian responsible for transferring the loan to Ocwen and MERS' business was furthered by this fraudulent loan assignment.

**J. PLAINTIFF'S HAS A VALID UNFAIR COMPETITION CLAIM UNDER BUSINESS AND PROFESSIONS CODE §§ 17200**

It would be unjust to permit defendants to escape liability because there are the assignee and third party beneficiary of a fraudulent and coercive loan assignment. The defendants should have taken adequate measures to prevent coercive conduct, as alleged in the First Amended complaint, which included misrepresenting the terms of the loan agreement to the Plaintiff and continuous failure and refusal to provide loan documents to the Plaintiff. Plaintiff believes that Defendants' wrongful conduct is ongoing and presents a continuing threat to members of the public and that Defendants continue to engage in the unfair and unlawful acts described above.

**K. PLAINTIFF'S FRAUD CLAIM WAS ALLEGED WITH SUFFICIENT PARTICULARITY**

The First Amended Complaint filed by the Plaintiff includes the who, what, when, where and how of the fraud in sufficient particularity in the facts section. Two AMERICAN HOME LOAN agents, Jonathan Annett and Hisham Desouki communicated with the Plaintiff and made specific misrepresentations regarding the terms of the loan which they persuaded and/or coerced the Plaintiff to enter into.

**L. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM IS ALLEGED WITH SUFFICIENT PARTICULARITY**

The defendant or its agents made misrepresentations to the plaintiff regarding the terms of the loan. The fact that these misrepresentations were made without reasonable grounds for believing them to be true is evident from the defendants and their agents' conduct when they repeatedly refused to provide a copy of the terms of the loan agreement. This satisfies the requirements for negligent misrepresentation claim.

